1990

Provo City Corporation v. Mary C. Werner : Brief of Appellant

Utah Court of Appeals

Micheal J. Petro; Attorney for Defendant/Appellee.
Veron F. (Rick) Romney; Attorney for Plaintiff/Appellant.

IN THE UTAH COURT OF APPEALS

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PROVO CITY CORPORATION,	
Plaintiff & Appellant	Brief of the Appellant
vs.	
MARY C. WERNER,	Case No. 900161-CA
Defendant & Appellee	

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Appeal from the Fourth Circuit Court
State of Utah, Provo Department, Judge Dimick
Argument Priority Classification 11

Michael J. Petro
Attorney for
Defendant/Appellee

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Plaintiff/Appellant

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STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred on the Utah Court of Appeals by Utah Code Ann. § 78-2a-3(3).

NATURE OF THE PROCEEDINGS

This interlocutory appeal is from an order granting Defendant's motion to suppress evidence, entered by the Honorable Joseph I. Dimick, Fourth Circuit Court Judge of the Provo Circuit, State of Utah.

STATEMENT OF THE ISSUES

I. Whether properly gathered police evidence can be suppressed where the defendant claims police interference precluded her from securing an independent chemical test as permitted by UTAH CODE ANN. § 41-6-44.10(6)?

II. Whether properly gathered evidence can be suppressed in contravention of the clear and plain reading of UTAH CODE ANN. § 41-6-44.10(6), which clearly states that failure of the accused to secure an independent test, cannot affect the admissibility of police evidence?

DETERMINATIVE STATUTES

A reproduction of UTAH CODE ANN. § 41-6-44.10 in its entirety is set forth in the addendum, pursuant to the Rules of the Utah Court of Appeals 24(a)(6) and 24(f).

In relevant part, the code states:

> (a) The person to be tested may, at his own expense, have a physician of his choice administer a chemical test in addition to the test or tests administered at the direction of the peace officer.
>
> (b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.
>
> (c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

STATEMENT OF THE CASE

On November 14, 1989, the Defendant Mary Werner was arrested by Provo City police officers for driving under the influence. (R. at 25). She was asked to submit to a breath test, which she refused, requesting a urine sample instead. She was then informed, under Utah's Implied Consent Law, that: one, she might lose her driver's license if she did not submit to the test; and two, she had the right to obtain an independent test administered by a physician of her choice. (R. at 30). Consequently, Ms. Werner relented and submitted to the Intoxilyzer test. (Id.) The Defendant then renewed her demand for a urine sample. (Id.) The Defendant was given a urine sample bottle, and a private restroom was made available for her use.(Id.) The Defendant then took the bottle, and of her own volition secured a sample for analysis. (R. at 26). Upon release, the Defendant took the sample to the Utah Valley Regional Medical Center for testing. The Hospital refused to test the urine sample claiming that the chain of custody was disputable. (R. at 26). Consequently, at trial, the Defendant moved to suppress the evidence of the Intoxilyzer breath test. The trial court found that the Defendant was made aware of her right to a physician administered test, and that the police did not act in bad faith to frustrate her right to an independent test. (Ruling, Appendix). However, he held that the police's response to the Defendant's request for an individual test did not provide the Defendant with a reasonable opportunity to exercise that right, which the trial court claimed amounted to a denial of due process.

(Ruling, Appendix). Consequently, the court granted the motion to suppress. The City appeals from that decision of the trial court.

SUMMARY OF THE ARGUMENT

The plain meaning of UTAH CODE ANN. § 41-6-44.10(6) is clear. Failure by the defendant to secure an independent test cannot affect the admissibility of properly secured police evidence. It would be against legislative intent and public policy to allow the trial court's suppression order to stand. Driving under the influence is an evil which the Utah Legislature has sought to curb through the enactment of strict legislation, and the trial court's ruling should not be allowed to circumvent the clear and plain meaning of the statute.

Furthermore, the Appellee was afforded a reasonable opportunity to secure an independent test. The burden of gathering exculpatory evidence rests on the Appellee, not the City. The Appellee was properly informed of her right to an independent test, and it was her duty to make sure that proper testing procedures were followed. There was no unreasonable interference by the officers, and their actions did not frustrate her right to secure an independent test.

Likewise, it is highly unlikely that the Appellee's evidence would have been exculpatory. Her blood alcohol levels were well above the limits allowed by law, and she failed to successfully complete the field sobriety tests administered by the officer. There was no evidence of bad faith, which would have resulted in

a loss of due process, on the part of the police, since it is apparent that their evidence would stand for itself.

DETAIL OF THE ARGUMENT

I. TRIAL COURT SUPPRESSION OF MARY WERNER'S POLICE ADMINISTERED INTOXILYZER TEST RESULT WAS AN ABUSE OF DISCRETION, IN DIRECT CONTRAVENTION OF BOTH STATUTE AND LAW.

The trial court's ruling suppressing police evidence, collected according to correct evidentiary procedures, places an inordinate burden on the police in dealing with intoxicated drivers. If the trial court's ruling is affirmed, the police could be required to provide substantially more help to defendants than is either prudent or necessary. In effect, the police, under this erroneous ruling, may be required to gather and preserve evidence for the accused. This would limit police efficiency in dealing with the myriad of problems which they confront daily, plus such a ruling flies in the face of legislative intent in passing laws to combat the scourge of driving under the influence of alcohol. The suppression of properly secured police evidence, gathered in good faith and without a showing of bad faith motives on the part of the police, sends an improper message to those whose alcohol related- activities threaten public safety.

A. Utah Code Section 41-6-44.10(6) Clearly Demonstrates The Legislature's Intent That Police Evidence Not Be Suppressed Upon Defendant's Failure to Secure An Independent Test.

The Utah Supreme Court in Johnson v. State Tax Comm'n, 17 Utah 2d 337, 411 P.2d 831, 832 (1966), in addressing the issue of legislative intent, declared that in "determining that intent the statute should be considered in the light of the purpose it was

designed to serve and so applied as to carry out that purpose if that can be done consistent with its language." Furthermore, in Parson Asphalt Products v. Utah State Tax Comm'n, 617 P.2d 397, 398 (Utah 1980), the Court stated that "[n]otwithstanding the foregoing, there is also to be considered the over-arching principle, applicable to all statues, that they should be construed and applied in accordance with the intent of the legislature and the purpose sought to be accomplished." The Supreme Court of Kansas echoed this sentiment declaring that "[o]ur construction should be based on legislative intent to be determined from the whole act and construction should be in accord with the general intent and purpose of the entire statute." In re Birdsong, 216 Kan. 297, 532 P.2d 1301, 1307 (1975). Likewise, the Supreme Court of Utah's sister state, Idaho, stated that

> [i]n construing a statute not only must the literal wording of the statute be examined, but also account must be taken of other matters, such as the context, the object in view, the evils to be remedied, the history of the times and the legislation upon the same subject, public policy, contemporaneous construction and the like.

Knight v. Employment Security Agency, 398 P.2d 643, 645 (1965).

Indubitably, drunk driving is a menace on our streets and highways. Therefore, state legislatures have enacted tough laws to deal with such a serious offense as driving under the influence of alcohol. Utah is no exception. Utah's Implied Consent Law states that a

> person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood

or breath alcohol content statutorily prohibited ....

UTAH CODE ANN. § 41-6-44.10(1)(a) (1953) As part of this statutory scheme, it is also recognized that the "person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer." UTAH CODE ANN. § 41-6-44.10(6)(a) (1953) This statute further provides, that the "failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer." UTAH CODE ANN. § 41-6-44.10(6)(b) (1953) The literal wording of this statute boldly and plainly delineates a defendant's rights when arrested for driving under the influence of alcohol. A person charged under this law has the right to have a "physician of his own choice" administer a second test. However, the unambiguous wording of the statute does not allow for suppression of police evidence because of a lack of diligence on the part of the defendant in securing or properly maintaining her own sample. Under the Parson test, the "intent of the Legislature and the purpose sought to be accomplished" by this legislation was to provide defendants with statutory rights to secondary tests, but not the privilege of suppressing legitimate, police administered Intoxilyzer tests.

According to the Knight test, the literal wording of the statute, its context, objective, evils to be remedied, contemporaneous history, and public policy should be the measure

against which a statute is to be gauged. The literal wording of the statute does not allow for the court to suppress police evidence on account of Ms. Werner's failure or inability to obtain an independent test. Furthermore, driving under the influence is a societal ill which the Utah Legislature sought to control by passing the Implied Consent Law. In addressing the serious nature of this offense, the Legislature did not intend for the suppression of police evidence, when a defendant carelessly fails to preserve her own evidence. The wording of Section 41-6-44.10(6)(b) plainly states that the "failure or inability" of a defendant to obtain her own test "does not affect admissibility" of the police administered test. By granting Ms. Werner's motion to suppress, the trial court ignored the plain meaning of the statute, and ruled in direct contravention of the Legislature's intent. This ruling substantially weakens the law by allowing those, who would put the public in danger through their irresponsible acts, to prevail over legitimate police procedures carried out with the blessing of the law as constituted by the representatives of the people. Public policy is ill served through rulings of this sort.

B. Ms. Werner Was Afforded A Reasonable Opportunity to Secure An Independent Test And Evaluation Of The Same.

Ms. Werner claimed that the police by providing her with a vial interfered with her right to an independent test. This claim fails for two reasons. First, the testimony of Officer West reveals that Ms. Werner was told that she could obtain her own sample, and "have it analyzed" wherever she chose. (R. at 30). Second, the admonition on the DUI report form was read to Ms.

Werner, thus placing the obligation of securing an independent test on Ms. Werner, not the police. Id. The admonition states

> [i]f you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle may be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does not delay the test or tests requested by me.

(Appendix). This admonition is a succinct version of UTAH CODE ANN. § 41-6-44.10(6). Accordingly, the onus of securing another test rests with Ms. Werner and not with the police. Neither the admonition nor the statute places the burden of gathering evidence for the accused on the police. It is well recognized that the "police must not hinder an individual's timely, reasonable attempts to obtain an independent examination, but they need not assist him." Schroeder v. Dept. of Motor Vehicles, 772 P.2d 1278, 1281 (Nev. 1989). see also, State v. Hudes, 128 N.J.Super. 589, 321 A.2d 275 (1974).

The Idaho Supreme Court, in examining the right of a defendant to an independent blood test after being arrested for driving under the influence, declared that

> the law does not impose upon law enforcement agencies the requirement that they take the initiative, or even any affirmative action, in procuring the evidence deemed necessary to the defense of an accused. Rather it is the accused who must act to protect his interests, and it is only when he is denied an opportunity, reasonable under the circumstances, to procure a timely sample of his blood that he can properly claim a denial of due process.

State v. Reyna, 92 Idaho 669, 448 P.2d 762, 767 (1968) (quoting In re Koehne, 54 Cal.2d 757, 8 Cal.Rptr. 435, 356 P.2d 179 (1960)).

Furthermore, the Court declared that the "State may not suppress evidence, but it need not gather evidence for the accused." Id. The burden rests squarely on the defendent to gather that evidence which is essential to her case.

Ms. Werner claims that by giving her a vial the police denied her a reasonable opportunity to preserve possibly exculpatory evidence. (R. at 53). However, as Officer West testified, Ms. Werner was not coerced or instructed as to any alternative test she was to perform.(R. at 30-31). She was free to use the phones, call a physician, lawyer or any other person she chose to assist her with the testing. (Id.) This was not a police duty. The police had their evidence, which they felt was sufficient for their purposes. Their duty became one of preserving that evidence, not gathering exculpatory evidence for the accused. That responsibility continues with the defendant at all times. As it was stated in Commonwealth v. Alano, 388 Mass. 871, 448 N.E.2d 1122 (Mass. 1983), "it is the accused who must act to protect his interest, and it is only when he is denied an opportunity reasonable under the circumstances, to procure a timely sample of his blood that he can properly claim a denial of due process." see also, In re Newbern, 175 Cal.App.2d 862, 1 Cal.Rptr. 80 (Cal. Dist. Ct. App. 1959). The burden of gathering exculpatory evidence, never shifted to the police, it continued with the accused--Ms. Werner.

1. There was no unreasonable interference from the police abridging the Appellee's right to a second test.

There is no doubt that egregious police interference with the right of the accused to secure exculpatory evidence warrants the suppression of evidence gathered for the prosecution. Where the level of police interference has risen to the plane of overt interference with an accused's right to gather evidence, the courts have been strict in suppressing police evidence. In State v. Swanson, 722 P.2d 1185 (Mont. 1986), the Montana Supreme Court ruled that the negligence of the police in allowing the defendant's blood sample to remain unrefrigerated, thus destroying its possible exculpatory value, constituted unreasonable interference with the accused's ability to gather evidence. The Court held that since the police had taken the sample from Swanson, they had a duty for its safekeeping. They failed in that duty, hence warranting dismissal of the case. Id. See also, City of Blaine v. Suess, 612 P.2d 789 (Wash. 1980)(Dismissed because of failure of police to explain to foreigner his rights to second test); McNutt v. Superior Court of State of Arizona, 133 Ariz. 7, 648 P.2d 122, (1982) (Police held accused incommunicado, frustrating independent test); In re Martin, 24 Cal.Rptr. 833, 374 P.2d 801 (1962)(Police denial of authorization to hospital to conduct independent test); State v. Hilditch, 36 Or.App. 497, 584 P.2d 376 (Or. Ct. App. 1978)(Accused returned to jail, after hospital refused test until Accused could pay; Officer knew Accused's wife was en route with money when officer returned him to jail); Oshrin v. Coulter, 142 Ariz. 109, 688 P.2d 1001 (1984)(Defendant destroyed blood sample after being released from jail and having charges dismissed); Ward v. State,

758 P.2d 87 (Alaska 1988)(Officer refused to permit Defendant to choose alternative site for testing, because the State did not have a contract with Defendant's choice of hospitals).

Although from diverse jurisdictions, the above cases reveal one consistency: in order for the courts to dismiss a case or suppress evidence, the level of police interference has to be more than casual; it must rise to a plane of substantial interference with a defendant's right to an independent test. The courts have been willing to permit innocent mistakes without suppressing evidence or dismissing cases. The Arizona Court of Appeals found no unreasonable interference where the defendant in a DWI case was informed that his pretrial hearing had been "scratched", whereupon the defendant destroyed his breath sample after waiting a month. The Court held that this was not unreasonable interference since the "second breath sample in this case was destroyed by appellee, not the police, and not as a result of any affirmative conduct on the part of the police or judicial system." State v. Crotty, 152 Ariz. 264, 731 P.2d 629 (Ariz. Ct. App. 1987).

In Montana, the Montana Supreme Court ruled that a defendant's repeated requests for an independent test during the reading of the Implied Consent Law Advisory Form, which were denied, but later complied with, was not unreasonable interference by the police. State v. Clark, 762 P.2d 853 (Mont. 1988). In Clark, the officer made five phone calls for the defendant, but the defendant did not once make a request for a blood test during any of these calls. The Court found that the "criminal accused has a constitutional

right to attempt to obtain exculpatory evidence." Id. at 855. At the same time, however, the Court held that "[o]ur decisions do not mandate police officers to affirmatively act to obtain exculpatory evidence, but instead, to avoid interference with efforts on the part of the accused to obtain a sampling of his blood." Id. The Court then went to hold that "[n]o unreasonable impediments exist in the present case." Id. at 856.

In State v. Goodwin, 160 Ariz. 366, 773 P.2d 471, 472 (Ariz. Ct. App. 1989), the Defendant was given a second sample of his breath, and the officer told him that "if you want to throw it away, throw it away yourself." The defendant stood up and deposited the sample in a trash can. Id. In ruling that the trial court erred in suppressing the state's evidence, the Arizona Court of Appeals found that the defendant had acted unilaterally in destroying the second breath sample, without unreasonable interference from the police officer. Id. at 474. The Court also found that the officer had not acted improperly, although in handing the defendant the sample, he did more than was required of him by law. Id.

In another Arizona case, the Arizona Court of Appeals in State v. Ramos, 155 Ariz. 153, 745 P.2d 601 (Ariz. Ct. App. 1987), found that it was error to dismiss the State's DWI case against Ramos. Ramos asked for the dismissal, since he was unable to secure an independent blood alcohol test, because of the arresting officer's failure to inform him of his right to an independent chemical test. Id. at 601. The Court held that "[f]ailure of the officer to

inform the DWI suspect of his right to an independent test does not constitute interference with the ability to get an independent test. Ramos was free to arrange for an independent test." Id. at 604. The Court further explained that the defendant "was afforded a fair chance to obtain independent evidence of sobriety essential to his defense at the only time when it was available." Id. at 604. Consequently, there was no interference on the part of the State as affecting Ramos' right to an independent chemical test.

In the case at hand, it is not disputed that the police gave Ms. Werner a vial, and told her she could obtain her own sample. (R. at 30). Although the officers took this step, their actions were not of the type censored by the courts in City of Blaine, McNutt, In re Martin, Hilditch, Oshrin, and Ward. Their actions were more in line with those permitted by the courts in Crotty, Clark, Goodwin, and Ramos. Ms. Werner was read the admonition from the DUI Report Form and was aware that the onus was on her to secure the independent test. (R. at 30). The fact that the officers gave her a vial did not prevent her from questioning her attorney, a doctor, or any other qualified person about the correct manner in which to proceed with the test. There is nothing in the record which would indicate that she made such an effort. In fact, strict compliance with the admonition or the statute on which it is based, would have required Ms. Werner to secure the independent test through a physician of her choosing. If Ms. Werner had followed the statutorily approved route, her independent sample

would not have suffered from the infirmities which she claims.

Furthermore, it was not police conduct, but that of a third party interloper, the hospital, which caused the interference claimed by the Appellee. The refusal of the hospital to test the independent sample was no fault of the police. Therefore, the hospital's refusal to test her sample cannot inure to the detriment of the police, and the intoxilyzer test requested by the police cannot be suppressed. Ms. Werner was free to consult with any of the several hospitals in the immediate area in order to have her urine sample tested. The record does not reveal, nor is any explanation given as to the failure of the Appellee to seek out an alternative testing center. Consequently, the Appellee's unilateral actions and the actions of others, of which the police had no control over, cannot be considered unreasonable interference by the police to an independent test.

C. The Intoxilyzer Test And Other Facts Tend to Inculpate The Appellee, Casting Doubt On The Exculpatory Nature Of An Independent Test.

The United States Supreme Court in California v. Trombetta, 467 U.S. 479, 489 (1984), citing United States v. Agurs, 427 U.S. 97, 109-110 (1976), declared that for evidence to meet the standard of constitutional materiality, it "must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means." The Court in Trombetta was asked to determine whether the Intoxilyzer was a viable means of testing breath samples, since the

Intoxilyzer does not preserve a sample for later testing. The Court held that although evidence gathered through use of an Intoxilyzer satisfies the constitutional materiality test, preservation of breath samples from an Intoxilyzer would be inculpatory rather than exculpatory in all but a tiny fraction of cases. Id. at 489. The Court also stated that although the Constitution imposes a duty on States to preserve evidence, such duty is limited to evidence which could play a significant role in a suspect's defense. Id. Consequently, since the evidence gathered and destroyed by the Intoxilyzer is considered to be inculpatory, and not exculpatory, states are under to no duty to preserve secondary samples for a defendant's use.

The Utah Supreme Court in Layton City v. Watson, 733 P.2d 499 (Utah 1987), adopted the Supreme Court's reasoning verbatim concerning the use of the Intoxilyzer. Consequently, in the State of Utah, law enforcement agencies are not required to preserve breath samples for those they arrest for DUI under the Trombetta analysis.

The Colorado Supreme Court addressed this issue in People v. Humes, 762 P.2d 665 (Colo. 1988), where the problem of suppressed evidence concerned the State's procedure of obtaining blood samples, for the State's exclusive use. The State had collected two samples from Humes, both of which were destroyed during testing. Consequently, Humes was left without an independent test with which to challenge the State's evidence. The trial court allowed the suppression of the State's evidence and the District

Court confirmed. The Colorado Supreme Court reversed, and, relying on Trombetta, expressed its doubt as to the exculpatory value of the destroyed evidence. The court explained that "the blood sample here fails to meet the 'exculpatory value' requirement." Id. at 668. Concerning an independent test, the Court stated that "[b]ecause we are not persuaded that this evidence had exculpatory value apparent before its loss, we need not consider whether the defendant would be unable to obtain comparable evidence by other reasonably available means." Id.

The Appellee was tested by an Intoxilyzer, which revealed her blood alcohol content to be .13, well over the limit allowed by law. (DUI Form, Appendix). Furthermore, the Appellee had a strong odor of alcohol about her. Id. Also, her speech was "slurred, loud & continual--very foul and abusive." Id. The Appellee was given routine field sobriety tests which she failed to complete satisfactorily. Id. This evidence, plus the attested reliability of the Intoxilyzer by the United States Supreme Court and the Utah Supreme Court, demonstrate that an independent test more than likely would have confirmed the Appellee's level of intoxication demonstrated by her Intoxilyzer test. Consequently, it is completely incongruous that the trial court could suppress evidence which was clearly inculpatory, simply because of the defendant's failure to secure an independent test. If the highest Court of the land can attest to the reliability of the Intoxilyzer to the degree, that they do not require that a sample to be preserved for defense use, then it is highly unlikely that the Appellee could

have produced exculpatory evidence had she been able to test her urine sample. Furthermore, as the Supreme Court explained in Arizona v. Youngblood, "the exculpatory value of the evidence must be apparent 'before the evidence was destroyed.'" ___ U.S. ___, 109 S.Ct. 333, 336 (1988). It is apparent that the exculpatory value of the Appellee's evidence was nil, before it was destroyed.

Likewise, there was no denial of due process simply because the Appellee lost her opportunity to an independent test. In Trombetta, it was held that "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis tests at trial." 467 U.S. at 491. In other words there is no violation of due process, where in using the Intoxilyzer, the evidence is destroyed through no fault of the police. Furthermore, no denial of due process exists in this case where the Appellee, through her own lack of due care, was unable to secure an independent test. The police had no control over Ms. Werner's choice of tests. She made her choice, that choice was out of the police's control, there was no denial of due process under these circumstances. Furthermore, the trial court found no evidence of bad faith and, as the United States Supreme Court held, in Youngblood, ___ U.S. ___, 109 S.Ct. at 337 (1988), that " unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." There was no finding of bad faith as the trial court itself attested (Ruling, Appendix). Therefore, there was no

denial of due process.

The Alaska Court of Appeals in Gundersen v. Municipality of Anchorage, 762 P.2d 104 (Alaska Ct. App. 1988) addressing the issue of whether an incomplete implied consent form constituted grounds for suppression of police evidence, declared that "[i]n the absence of some evidence to the contrary, an independent test would as likely corroborate as invalidate the municipality's test." Furthermore, the Court declared that

> [t]his is not a case in which there is some evidence of a bad faith attempt by the municipality to discourage Gundersen from obtaining an independent test. Such evidence, if present, might support an inference that the officers lacked confidence in the integrity of their own test, justifying a spoliation instruction.

Id. at 114. The Court then went on to state that "[t]here is nothing in this record to suggest that the municipality intentionally or negligently failed to produce the strongest evidence available to it, or that an independent test, if obtained, would have been exculpatory." Id.

So it is with the case at hand. There was no attempt to discourage or interfere with Ms. Werner's right to an independent test. The police were confident that their evidence by way of the Intoxilyzer and other tests would stand for itself. They did not act in bad faith. There is nothing to suggest that had the Appellee secured an independent test, that it would have proved anything different than what was shown by the Intoxilyzer.
The City does not challenge the Appellee's right to dispute the validity of testing procedures, the officer's training, or to raise doubts as to whether the test was properly administered. It is,

however, the grossest of inconsistencies for the trial court to suppress properly gathered evidence, in contravention of State statutes, simply because of the Appellee's failure to secure an independent test.

CONCLUSION

For all of the foregoing reasons, the Appellant respectfully requests that the Suppression Order of the Fourth Circuit Court be reversed.

Dated this 11th day of July 1990.

Vernon F. (Rick) Romney

CERTIFICATE OF SERVICE

I hereby certify that 4 true and correct copies of the foregoing Appellant's Brief were served by mailing, U.S. Mails, postage prepaid, on this 11 day of July 1990 to the following individuals:

Michael Petro, Attorney for Appellee
101 East 200 South
Springville, Utah 84663

APPENDIX

R U L I N G

In this matter this Court is being asked by the Defendant to suppress the result of a breath test administered by the police to the defendant pursuant to the arrest of the defendant on driving under the influence charges.

Based on the evidence presented by the parties at an evidentary hearing on the motion, the Court makes the following findings of fact.

1. On the fourteenth day of November, 1989 the defendant was arrested by the Provo police and brought to the police department where she was requested to submit to a breath test.

2. At first the defendant declined, saying she had no confidence in the breath testing process and asked for a urine test.

3. The police read to the defendant the provisions of the "implied consent law" including her right to an independant test whereupon she consented to the breath test, and gave it, all the while advising that she also intended to have an independant test.

4. After the breath test was completed the defendant inquired again about the independant test.

5. The police officer who had custody of the defendant responded by handing the defendant a vile and saying to her that he thought she could keep a urine sample in the vile and have it tested later.

6. The defendant took the vile into a restroom, unattended, placed a sample of her urine in it and stopped the vile with other materials provided by the police.

7. The vile was not sealed, or marked in any fashion.

8. The defendant, when released, took the vile to a local hospital and requested that they analize it.

9. The hospital eventually decline to do so, noting in a letter to the defendant that the vile had not been sealed, marked and lacked the necessary chaine of evidence.

The defendant does not claim that she did not receive notice of her right to an independant test nor is there anything in the evidence from which this Court could conclude that the police acted in bad faith or intentionally to frustrate an independant test.

The City, in response to the motion primarily relies on the provision of section 41-6-44.10(6)(a) and (b) which provides for the independant test and there in paragraph (b) reads: "(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test taken at the direction of a peace officer..."

This Court however rejects the notion that the above cited provisions address themselves to wider circumstances than "...the failure or inability (of the defendant) to obtain the additional test...", and is silent with respect to what the remedy may be when the failure results, at least in part, from police conduct.

It seems clear that if the failure to obtain an independant test does stem from police actions that such failure may well amount to a denial of due process and the appropriate sanition or remedy may well be the suppression of the result of the governments test notwithstanding the statute.

Therefore the issue becomes one of deciding if the police response to the defendant's request for an independant test provided a reasonable opportunity to effectively exercise that right.

Most of the cases dealing with these questions have turned on extremely different facts, such as whether the police frustrated the test, or gave notice of a right to it, or had some duty to provide affirmative assistance in obtaining the test.

Not so here. In this case the police clearly gave notice of the right, followed by a suggestion as to how the defendant might proceed and there provided the materials to undertake the effort.

So the question presented here is more one of if the police do undertake to give assistance to procure a test; must it have some reasonable chance of success.

Clearly, the urine sample taken by the defendant could never have been admitted into evidence under the rules of evidence. There could never have been an adequate foundation laid.

It is also clear that the police response amounted to giving advice which the defendant followed.

After considering all of the above this Court finds that the police did not provide a reasonable opportunity to the defendant to effectively exercise her right to an independant test and that such conduct did act to deny the

INTOXILYZER

OPERATIONAL CHECKLIST - D (ASA)

SUBJECT Mary Werner DATE 11-14-89 TIME 0209

INSTRUMENT # 94-001130 LOCATION Provo PD

OPERATOR [signature]

- [x] 1. POWER SWITCH ON, READY LIGHT ON.
- [x] 2. CONNECT BREATH TUBE TO PUMP TUBE, INSERT TEST RECORD CARD.
- [x] 3. PRESS ADVANCE, WAIT FOR LIGHT 2.
- [x] 4. PRESS ADVANCE, WAIT FOR LIGHT 3.
- [x] 5. DISCONNECT PUMP TUBE FROM BREATH TUBE, EXTEND BREATH TUBE AND INSERT MOUTHPIECE. - TAKE BREATH SAMPLE. (NOTE TIME) LIGHT 4 WILL COME ON AFTER SAMPLE IS TAKEN.
- [x] 6. REMOVE MOUTHPIECE, HOUSE BREATH TUBE AND CONNECT TO PUMP TUBE, PRESS ADVANCE WAIT FOR LIGHT 5. REMOVE TEST RECORD CARD.
- [x] 7. POWER SWITCH OFF.

HPT—18 (P-418)
10/86

TEST RECORD CARD FOR THE

INTOXILYZER® INSTRUMENT-4011 MODELS

GRAMS ALCOHOL PER 210 LITRES BREATH	INSTRUMENT PRINT CODE
•	A — AIR BLANK
•	B — BREATH
•	C — CALIBRATOR (Simulator)
•	OBSERVED SUBJECT FOR REQUIRED OBSERVATION PERIOD AND FOLLOWED CHECK LIST
•	[signature] OPERATOR'S INITIAL
•	Provo PD INSTRUMENT LOCATION
•0 0	94-001130 INSTRUMENT SERIAL NUMBER
•	11-14-89 DATE
•	

Mary Werner
SUBJECT'S NAME

0143 TIME FIRST OBSERVED

0209 TIME TEST STARTED

[signature]
OPERATOR

ADDITIONAL INFORMATION AND / OR REMARKS

m/c By West 0143

m/c By Nisse 0151

,133

CITATION NO.
D 19400

DUI REPORT FORM

I. CASE IDENTIFICATION:

Date 11-14-89 Day TUES. Accident No. Case # 8909241 Time Prepared 0420
Subject's Name Mary C. WERNER Address 108 Navajo Page, AZ. 86040
Place of Employment Unemployed Address —
Home Telephone Number None Work Telephone Number None
D.O.B. 8-5-47 Driver License # 560 74 5383 Time of Arrest 0140
Place of Arrest 455 W. 30 S. Provo, UT. Charges DUI
Arresting Officer Sgt. M L WEST Assisting Officers O. MASON & Cpl. NILSON
Arresting Agency Provo P.D.

II. VEHICLE

Year 86 Color wh. Make Chev. Model Monte Carlo 2dr
License # and state 449 AMP UT 5-90 Disposition Kept by Glen WERNER
Registered Owner Glen WERNER Address

III. WITNESSES: (If passengers, indicate specifically)

Name	Address	Tele. #	Age/DOB
1. Glen H. WERNER (passenger)	402 W. Center St. Provo, UT.	374-8273	59/ 8-16-30
2.			
3.			
4.			
5.			

IV. ACTUAL PHYSICAL CONTROL:

The facts establishing the subject's actual physical control of a motor vehicle are: S. Mary WERNER was the driver. When the car stopped in the motel parking lot, she exited the drivers side. S. admitted to being the driver as well.

V. DRIVING PATTERN:

Subject's location when first observed W/B on Center St. from about 430 W. Center.
The facts observed regarding driving pattern: None noted.

VI. PRE-ARREST STATEMENTS OF SUBJECT:

S. said she had been drinking Bicardi & coke; 2 drinks.

VII. PHYSICAL CHARACTERISTICS:

Odor of alcoholic beverage Strong
Speech Slurred, Loud & Continual. Very foul & abusive
Balance Poor. Staggered, wobbly & unstable
Signs or complaints of injury or illness Stiff throat, nerves & Adenoid infection.
Other physical characteristics

VIII. **FIELD SOBRIETY TESTS:** (Describe subject's actions)

1. Horizontal Gaze Nystagmus — Eyes did not pursue smoothly, Nystagmus prior to 45° onset & at Maximum deviation.
2. Heel to Toe — Did not touch the heel of one foot to the top of the other. After 9 steps had to ask how to continue. Very unstable stepping off from the line on several occassions.
3. Count from 77-66 backwards — Began correctly, became confused, missing numbers
4. and She counted down into the 40's sometimes skipping 10 numbers.
5.

Were tests demonstrated by officer? Yes Subject's ability to follow instructions Poor

IX. **SEARCHES**

A. Vehicle:
Was subject's vehicle searched? Yes Where? At UT Co. Jail
When? 0400 Evidence Bottle of BICARDI RUM
Person who performed the search Sgt. McWest

B. Subject:
Was subject's person searched? Yes Where? Provo Jail
When? 0200 Evidence Found None
Person who performed the search Sgt. McWest

X. **CHEMICAL TESTS:**

Mr. or Mrs. Mary C. WEBSTER, do you understand that you are under arrest for driving under the influence of alcohol (drugs)? Response, (if any) No Response "I am not listening to you."

I hereby request that you submit to a chemical test to determine the alcohol (drug) content of your blood. I request that you take a breath test.
(blood-breath-urine)

☑ The following admonition was given by me to the subject before the chemical test was administered:

Results indicating .08% or more by weight of alcohol in your blood shall, and the existence of a blood alcohol content or presence of drugs sufficient to render you incapable of safely driving a vehicle may, result in suspension or revocation of your license or privilege to operate a motor vehicle.

What is your response to my request that you submit to a chemical test? Response: I am refusing a breath test. I want a urine test. I've heard enough shit on the news about them breathalysers. No way.

Did subject submit to a chemical test? Yes Type of test Breath
Test Administered by Cpl. K. NILSSON Where? Provo Jail
Time: 0209 Results .139% Was subject notified of results? Yes
Serial No. of test machine:

(if the subject refuses the test, read the following)

☒ The following admonition was given by me to the subject:

If you refuse the test, it will not be given, however I must warn you that if you refuse, your license or permit to drive a motor vehicle may be revoked for one year with no provision for a limited driver's license. After you have taken this test, you will be permitted to have a physician of your own choice administer a test at your own expense, in addition to the one I have requested you to submit to, so long as it does

(if the subject claims the right to remain silent or the right to counsel, read the following:)

☐ The following admonition was given by me to the subject:

Your right to remain silent and your right to counsel do not apply to the implied consent law which is civil in nature and separate from the criminal charges. Your right to remain silent does not give you the right to refuse to take the test. You do not have the right to have counsel during the test procedure. Unless you submit to the test I am requesting, I will consider that you have refused to take the test. I warn you that if you refuse to take the test, your driver's license can be revoked for one year with no provision for a limited license.

XI. CONSTITUTIONAL RIGHTS:

Was subject advised of the following rights? Yes When 0215 hrs.
By Whom? Sgt. M Libert Where? From booking room.

✓ 1. You have the right to remain silent.
✓ 2. Anything you say can and will be used against you in a court of law.
✓ 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
✓ 4. If you decide to answer questions now without having counsel present, you may stop answering questions at any time. Also, you may request counsel at any time during questioning.

Were the following waiver questions asked? Yes

✓ 1. Do you understand each of these rights I have explained to you?
Response I want Mike Petro here.

✓ 2. Having these rights in mind, do you wish to talk to us now?
Response I'm tellin ya. I want to talk to Mike Petro.
Go ahead, I'll answer what I feel like answering.

INTERVIEW:

Were you operating a vehicle? Yes.
Where were you going? Right where you stopped me. Right where I stopped at.
What street or highway were you on? I was in the Hotel parking lot.
Direction of travel? Hotel. I don't know whether it was north, south, east or west.
Where did you start from? Whatever Harolds address is. I don't know.
When? 3 minutes before you stopped What time is it now? 0223 (Looked at clock)
What is today's date? 11-14-85 Day of week? Tues.
(Actual time 0223 Date 11-14-85 Day Tues.)
What city or county are you in now? Ill.
What were you doing during the last three hours? I had dinner & had 2 drinks. Tea for dinner & 2 drinks afterward of Bicardi & Coke.
Have you been drinking? 2 Bicardi Cokes, Plus Chloroseptic & Trianedic.
What? How much?
Where? At Harolds.
When did you have your first drink? "God, I don't have the slightest idea" Last drink? "30 minutes to 2, last c
Are you under the influence of an alcoholic beverage (drugs) now? Yes, I've had 2 drinks, Plus Chloroseptic, Plus Trianedic that I've had."
Are you taking tranquilizers, pills, medicines or drugs of any kind? Tranquilizers, yes. Medications ye
(What kind? Get sample) Chloroseptic, Trianedic & Valium.
When did you have the last dose? 5 minutes before you stopped me. Wasn't even 3 minu
Are you ill? Yes - Sore throat & adnoid infection, Strip throat.
(If subject was in an accident, ask these questions:) S indicated she had 5mg Valium at 2230 hrs.
Were you involved in an accident today?
Have you had any alcoholic beverage or drugs since the accident?
If so, what? When?
How much?

defendant due process of law.

Accordingly the defendants motion to suppress is granted.

Dated: _____

XII. OTHER OCCURRENCES OR FACTS:

XIII. ATTACHED DOCUMENTS:

I have attached the following documents to this report:

1. ☑ Copy of citation/temporary license
2. ☐ Subject's Utah driver's license or driver's permit
3. ☐ Traffic accident report
4. ☐ Other documents (specify) _____

I hereby certify that I am a sworn Utah Peace Officer and that the information contained above in this report form and attached documents is true and correct to my knowledge and belief and that this report form was prepared in the regular course of my duties. It is my belief the subject was in violation of section 41-6-44 U.C.A. at the date, time, and place specified in this report.

Sgt. M L West
Signature of Peace Officer
Law Enforcement Agency: Provo P.D.
Date: 11-14-89 Time: 0446 hrs.

The **original** of this form must be sent within five (5) days of the arrest of the subject to:

Driver License Division
4501 South 2700 West
P.O. Box 30560
Salt Lake City, Utah 84130-0560